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ATTORNEYS FOR DEFENDANT BMW OF NORTH AMERICA, LLC

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

JOSHUA HU, et al., individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

BMW OF NORTH AMERICA LLC, a
Delaware corporation; and BAYERISCHE
MOTOREN WERKE
AKTIENGESELLSCHAFT (BMW AG), a
corporation organized under the laws of
Germany, ROBERT BOSCH GMBH, a
corporation organized under the laws of
Germany; and ROBERT BOSCH LLC, a
Delaware Limited Liability Company,

Defendants.

Civ. Action No. 2:18-cv-04363
(JMV) (MF)

Oral Argument Requested

MOTION DAY: October 15, 2018

Filed Electronically

NOTICE OF DEFENDANT BMW OF NORTH AMERICA, LLC's MOTION TO DISMISS
(Oral Argument Requested)

PLEASE TAKE NOTICE that on October 15, 2018, at 9:00 a.m., or as soon thereafter as counsel may be heard, the undersigned attorneys for Defendant BMW of North America, LLC (“BMW NA”) shall move before the Honorable John J. Vazquez, U.S.D.J., at the United States District Court for the District of New Jersey, Martin Luther King, Jr. Building & U.S. Courthouse, 50 Walnut Street, Newark, New Jersey, for the entry of an order pursuant to Federal Rules of Civil Procedure 9(b), 12(b)(1) and 12(b)(6) dismissing with prejudice the Consolidated Class Action Complaint in the above-captioned action and taking judicial notice of certain relevant matters and for such other relief as the court deem just and proper.

PLEASE TAKE FURTHER NOTICE that, pursuant to the Stipulation and Scheduling Order entered by this Court on August 9, 2018, Plaintiffs’ opposition to BMW NA’s Motion to Dismiss is due on or before September 17, 2018, and BMW NA’s reply in further support of its Motion to Dismiss is due on or before October 9, 2018.

PLEASE TAKE FURTHER NOTICE, that, in support of this motion, BMW NA will rely upon the Memorandum of Law, the Declaration of Michael Lacovara, and the Request for Judicial Notice with exhibits attached thereto, as well as any submissions offered on reply.

PLEASE TAKE FURTHER NOTICE, that a proposed form of Order is also submitted herewith.

Dated: August 17, 2018
New York, New York

Respectfully submitted,

LATHAM & WATKINS, LLP

/s/ Kevin M. McDonough
Kevin M. McDonough

LATHAM & WATKINS LLP

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Defendants.

Civil Action No. 2:18-cv-04363
(JMV) (MF)

Oral Argument Requested

MOTION DAY: October 15, 2018

Filed Electronically

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT BMW OF NORTH
AMERICA, LLC'S MOTION TO DISMISS THE CONSOLIDATED CLASS ACTION
COMPLAINT**

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BMW of North America, LLC (“BMW NA”) respectfully submits this Memorandum of Law in support of its motion to dismiss the Consolidated Class Action Complaint (“Complaint”).

I. INTRODUCTION¹

Before the Court is but one example of a run of actions filed against major automotive manufacturers in the wake of the so-called “Dieselgate” scandal that befell Volkswagen starting in 2015.² Immediately after the first news reports about Volkswagen, regulators and independent testing organizations around the world have leveled unrivaled and exacting scrutiny of manufacturers of diesel-powered vehicles. The leading U.S. environmental regulators, the United States Environmental Protection Agency (“EPA”) and the California Air Resources Board (“CARB”), global leaders for decades in the development of emissions regulation and testing, have been at the forefront of these efforts. Searching inquiry and extensive, professional vehicle testing have resulted in regulatory actions accusing a number of manufacturers of having in one way or another engaged in improper conduct with regard to the management of diesel emissions.³ The

¹ In all quotations, unless otherwise noted, internal quotations and citations are omitted and emphasis is supplied.

² See, e.g., *Bledsoe v. FCA US LLC*, No. 16-cv-14024 (E.D. Mich. Nov. 14, 2016); *In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Practices & Prods. Liab. Litig.*, No. 17-md-2777 (N.D. Cal. Apr. 5, 2017); *Counts v. Gen. Motors LLC*, No. 16-cv-12541 (E.D. Mich. July 7, 2016); *In re Duramax Diesel Litig.*, No. 17-cv-11661 (E.D. Mich. May 25, 2017); *Gamboa v. Ford Motor Co.*, No. 18-cv-10106 (E.D. Mich. Jan. 10, 2018); *Lynevyeh v. Mercedes-Benz USA, LLC*, No. 16-cv-881 (D.N.J. Feb. 18, 2016); *Raymo v. FCA US LLC*, No. 17-cv-12168 (E.D. Mich. July 3, 2017); *In re Volkswagen Clean Diesel Mktg., Sales Practices, and Prods. Liab. Litig.*, No. 15-md-2672 (N.D. Cal. Dec. 8, 2015).

³ See, e.g., EPA, *All Volkswagen 3.0-Liter Diesel Engine Vehicles Affected* (Nov. 20, 2015), (Exhibit 1 to the Request for Judicial Notice (the “RJN”)) (“On November 2, 2015, EPA . . . alleged that [Volkswagen AG, Audi AG, and Porsche AG] vehicles included defeat devices.”); CARB, *CARB approves plan to mitigate harm from Volkswagen defeat devices* (May 25, 2018), (Exhibit 2 to the RJN) (“CARB engineers uncovered the defeat device[s]” in Volkswagen vehicles). As explained in the RJN filed as a companion to this motion, the Court can take judicial notice of these materials and the other news articles, regulatory press releases, and other publicly-available materials cited in this Memorandum (all of which are attached to the RJN for the Court’s convenience).

Complaint narrates much of this history in almost gleeful detail. What the Complaint *doesn't* say, however, is why any of that should be relevant to BMW NA.⁴

Even the latest pleading in this matter, filed on August 3, 2018, omits at least two material facts. *First*, when the International Council for Clean Transportation (“ICCT”), the very group that uncovered the emissions issues that led to the Volkswagen scandal, performed independent road testing on a BMW X5—one of the two BMW models at issue here and the model Plaintiffs’ counsel used for its paid, litigation-driven emissions testing (*see disc. infra* at Section IV.B.1.a) – the BMW X5 “passed” the road test.⁵ That omission cannot have been an accident: the Complaint affirmatively invokes the ICCT study, even as it declines to tell the Court the superior results of the BMW vehicle tested. Here is what the ICCT testing actually revealed *about BMW*: “In none of [the ICCT’s] road tests could they get their two Volkswagen cars to meet the claims, *even though a BMW they tested did fine.*”⁶ *Second*, the Complaint declines to mention that no U.S. regulator has so much as *suggested* that any BMW entity “cheated” or engaged in any sort of wrongful conduct with respect to its U.S. emissions control technology or regulatory certification efforts. To the contrary, a senior EPA official responsible for such matters—in an unprecedented public statement—announced that the EPA tested BMW vehicles extensively after the Volkswagen

⁴ BMW NA is an indirect subsidiary of Bayerische Motoren Werke AG (“BMW AG”), a German corporation. BMW NA is a Delaware corporation, with its principal place of business in New Jersey, that markets and sells BMW vehicles (principally to dealers) in the United States. At the time of this filing, BMW AG has not been served.

⁵ J. Plungis, et al., *VW’s Emissions Cheating Found by Curious Clean-Air Group*, Bloomberg (Sept. 19, 2015) (Exhibit 3 to the RJN) (“The BMW X5 passed the road test.”); *see also EPA’s Notice of Violation of the Clean Air Act to Volkswagen*, ICCT (Sept. 18, 2015) (Exhibit 4 to the RJN) (noting that the BMW X5’s “performance on the in-use tests shows that the technology needed to meet the U.S. motor vehicle air pollution emission standards for diesels is available”).

⁶ S. Glinton, *How a Little Lab in West Virginia Caught Volkswagen’s Big Cheat*, NPR (Sept. 24, 2015) (Exhibit 5 to the RJN) (relied upon by Complaint at ¶ 144 n.10).

scandal broke, and concluded that BMWs achieved favorable test results *honestly and without any evidence of “cheating” whatsoever*.⁷ But the EPA official did not stop there; he then disparaged—explicitly and publicly—the very sort of litigation-friendly “testing” that counsel for Plaintiffs paid for here.⁸

When the Court reviews the allegations of the Complaint relevant to BMW NA, ignores the transparent guilt-by-association narrative that occupies the bulk of the “facts” alleged, and discerns the gap between the relevant facts and the sweeping fraud claims alleged, it is evident that the Complaint must be dismissed.

II. FACTUAL BACKGROUND

A. The Parties, the Vehicles at Issue, and the Applicable Regulatory Regime

The original complaint before the Court was captioned *Garner Rickman, et al. v. BMW of North America LLC, et al.*, Case No. 2:18-cv-04363, which was amended as of right to *Chad Maccanelli, et al. v. BMW of North America LLC, et al.* on April 19, 2018, principally to add additional plaintiffs and to allege additional state-law claims. On May 8, 2018, certain other plaintiffs, represented by the same counsel, filed a complaint captioned *Ricky Evans, et al. v. BMW of North America LLC, et al.*, Case No. 2:18-cv-08935, which added twenty-one new plaintiffs,

⁷A. Dörner, *U.S. Environmental Agency EPA wants to intensify emissions controls on vehicles – Harsh Criticism of VW*, Handelsblatt (May 24, 2018) (a certified translation is attached for the Court’s convenience as Exhibit 6 to the RJN) (“We have investigated every product very thoroughly and have not found any illegal technology.”); *see also* M. Seiwert, *Green Light for BMW in the USA*, WirtschaftsWoche (May 25, 2018) (certified translation attached as Exhibit 7 to the RJN) (“The highest American U.S. environmental authority, the EPA, has cleared BMW of the suspicion of having illegally manipulated emissions technology in models sold in the U.S.A.”).

⁸ Seiwert, RJN Exhibit 7 (“EPA Director Grundler said that the solicitor Mr. Berman certainly does not have the expertise and laboratory technology that the EPA has. He is aware of the fact that there are companies that made such measurements for solicitors, but they did not work on them to a high standard. ‘We call them two men and a PEMS.’”); *see also* Beny, *BimmerToday, Environmental Agency EPA Clears BMW Diesel Engines* (May 29, 2018) (certified translation attached as Exhibit 8 to the RJN).

but was otherwise substantially identical to the complaint in *Maccanelli*. On August 3, 2018, the plaintiffs in both the *Maccanelli* and *Evans* actions (the “Plaintiffs”) filed the Consolidated Class Action Complaint (the “Complaint”), which is currently the subject of this motion. (*See* Dkt. # 26).

The Plaintiffs are forty-three named individuals who allege they purchased or leased a total of forty-four new or used BMW 335d or X5 diesel vehicles between 2010 and 2018.⁹ *See* Compl. ¶¶ 21-60. The Complaint generally alleges that “BMW”¹⁰ promoted its 335d and X5 models as diesel vehicles that satisfied the emissions requirements of all fifty states, claiming that “BMW” advertised these vehicles as “having reduced NOx emissions, or as [] clean vehicle[s],” and that they purchased their BMW diesel vehicles because they believed the vehicles to be “‘clean diesel’ and/or [] ‘low emission diesel’” vehicles. *See id.* ¶¶ 21-60, 119. The Complaint equates the phrases “clean diesel” or “low emission diesel” with compliance with prevailing U.S. regulatory emissions standards. Although sometimes hard to infer, given the Complaint’s welter of irrelevance and bluster, the basic alleged claim of falsehood appears to be that the two BMW models at issue were not compliant with those regulations, but succeeded in “passing” the relevant emissions tests through some form of technical artifice, now known colloquially as a “defeat device.” *Id.* ¶¶ 21-60, 252.

In order to be sold in the United States, a vehicle must be covered by a certificate of

⁹ Plaintiff Miguel Fragoso, first introduced to this litigation in the most recent pleading, asserts claims based on his alleged purchase of a BMW 2014 535d. *See* Compl. ¶ 47. The 535d utilizes an entirely different engine and exhaust system from the X5 and 335d and is not mentioned in Plaintiffs’ proposed class definition. *See id.* ¶ 289. In addition, the Complaint fails to provide any information regarding Plaintiff Gene Quint (also added on August 3, 2018). After naming Mr. Quint, the Complaint repeats the allegations about Plaintiff Charles Rogers. *See id.* ¶ 35.

¹⁰ The Complaint generally cites to “BMW” generically or refers collectively to the “BMW Defendants,” rather than to a particular defendant. This practice makes for both confusing imprecision and adds to the myriad pleading deficiencies of the Complaint, as described below.

<https://www.wiwo.de/unternehmen/auto/us-umweltbehoerde-epa-gruenes-licht-in-den-usa-fuer-bmw-/22604294.html?social=facebook>

WirtschaftsWoche

U.S. Environmental Agency EPA

Green Light for BMW in the U.S.A.

By Martin Seiwert

May 25, 2018



To date, the U.S. EPA authorities have not found any evidence for manipulations committed by BMW.

Image: AP

BMW has admitted only moderate defeat in the emissions scandal until now. Again and again, there were accusations and BMW had to admit there were software errors - but no manipulation. Now support is coming from unexpected quarters - the U.S. EPA authorities.

The highest American U.S. environmental authority, the EPA, has cleared BMW of the suspicion of having illegally manipulated emissions technology in models sold in the U.S.A. “We investigated products from BMW very thoroughly and did not find any evidence for fraud,” said the EPA Director, Christopher Grundler, in an interview with WirtschaftsWoche and Handelsblatt. Mr. Grundler is responsible for the Transport and Emissions department. But Grundler explicitly only alluded to BMW’s U.S. models, which can be structurally differentiated from European models. “I know that the situation in Europe is completely different.”

<https://www.wiwo.de/unternehmen/auto/us-umweltbehoerde-epa-gruenes-licht-in-den-usa-fuer-bmw-/22604294.html?social=facebook>

In Germany, the district attorney of Munich and the KBA (*Kraftfahrtbundesamt* [Federal Motor Transport Authority]) have pursued the suspicion that BMW used illegal emissions technology. BMW rejects the possibility of conscious manipulation and speaks of an engine control unit software that was inadvertently recorded.

On March 27, the star attorney Steve Berman (law offices of Hagens Berman in Seattle), who is revered in the USA, filed a civil suit against BMW. “BMW is committing fraud, just like VW committed fraud,” said Berman to *WirtschaftsWoche*. In their legal brief, which the *WirtschaftsWoche* has in its possession, Berman speaks of measurements taken on a used 2012 BMW X5 off-road vehicle, which the law office had emissions experts carry out. It was alleged, the vehicle could recognize if it is not in an emissions test and lower the emissions cleaning. The outcome? “The software manipulations result in emissions that are 3-times the threshold (highway) and up to 8.5-times (city).” The highest measured values were 20-times on highways and 27-times city values.

EPA Director Grundler said that the solicitor Mr. Berman certainly does not have the expertise and laboratory technology that the EPA has. He is aware of the fact that there are companies that made such measurements for solicitors, but they did not work on them to a high standard. “We call them two men and a PEMS.” (PEMS stands for portable emissions measurement system.)

The EPA and the Californian environmental agency CARB discovered the VW emissions scandal. The EPA still sees VW to have a significant deficit in terms of compliance and corporate culture. A conciliation procedure is underway at EPA against Daimler due to the suspicion of illegal emissions technology.

It became known on Thursday that the KBA discovered illegal emissions technology at Daimler as well. Daimler deems KBA’s measurements to be wrong for legal reasons: The two software functions criticized by the KBA would not have any influence on the result from the New European Driving Cycle test, but would only be conducive to the engine’s durability, and thus was not illegal. This is the legal opinion of the corporation. If needed, Daimler stated, it would be settled in court.

That BMW does not have anything to fear from the EPA was obviously not known until now. But for the executives of BMW, that was probably not entirely new. According to the information from *WirtschaftsWoche*, they had a meeting with the Director of the EPA, Scott Pruitt, on March 17, 2017. From 8:30 a.m. to 9:15 a.m., Mr. Pruitt received in his Washington office the BMW chief, Harald Krüger; the BMW communication chief, Maximilian Schöberl; and two BMW lobbyists. It is not known what issues were discussed.

It wasn’t likely to have been about critical exhaust measurements. That’s because Mr. Grundler, the EPA Director for measurements, was not present.



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Unternehmer stellen sich vor

KPMG

US-UMWELTBEBÖRDE EPA

Grünes Licht in den USA für BMW

von Martin Seiwert

25. Mai 2018



<https://www.bimmertoday.de/2018/05/29/usa-umweltbehörde-epa-entlastet-bmw-diesel-motoren/>

U.S.A.: Environmental Agency EPA Clears BMW Diesel Engines

News | 05/29/2018 by Beny 0



The list of big institutions and agencies which have cleared the BMW diesel engine has grown even longer in the last few days: The U.S. Environmental Agency EPA spoke ...

The list of big institutions and agencies which have cleared the BMW diesel engine has grown even longer in the last few days: Through the EPA Director Christopher Grundler, the U.S. Environmental Agency EPA spoke in detail with the newspapers WirtschaftsWoche and Handelsblatt about the diesel issue. Grundler confirmed the special role of BMW. Besides Volkswagen, his agencies also have Daimler in its sights. Grundler, however, stated clearly, “We have investigated every product very thoroughly and have not found any illegal technology.”

The EPA Director in fact is only speaking of the BMW diesel engines that are offered in the U.S.A. and not of the European models. By making this statement, he is also taking the wind out of the sails of litigation initiated by a private U.S. law office. Steve Berman is suing BMW in the U.S.A. and accuses the Munich-based firm of manipulated emission values, which the EPA director nonetheless relativizes. In Grundler’s opinion, Mr. Berman certainly does not have the expertise and laboratory technology that the EPA has. The companies hired by Berman are slightly disparaged by the EPA as “two men and one PEMS,” thereby alluding to their limited size and experience.

<https://www.bimmertoday.de/2018/05/29/usa-umweltbehörde-epa-entlastet-bmw-diesel-motoren/>



The WirtschaftsWoche newspaper summarizes the situation for BMW by saying that the Munich-based company has nothing to fear from the EPA. The EPA chief, Scott Pruitt, could have discussed that with the BMW chief, Harald Krüger, already back in March when they held a meeting. The actual content of the conversation back then, however, is not known.

Before the EPA cleared the diesel engine of the BMW Group, investigations from ADAC and TÜV did the same. Again and again, the diesel engines from Munich were conspicuous for their above-average, well cleaned emissions. From today's perspective, manipulation software able to detect testing or the like was not used.

It is all the more aggravating that human error in a small number of the 11,700 specimen of the BMW M550d and 750d meant that recordings made on engines in factories could be made by the wrong engine software. The wrong software did not even have any advantages when tested or in daily driving and thus was conceivably inadequate for conscious manipulation. Nevertheless, since quite a lot is lumped together in the diesel context, the clean record of BMW Diesel got a few completely avoidable stains.

Emissions scandal BMW Diesel BMW engines BMW USA

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- BMW M4 Coupé: New wallpapers show M4 F82 in sapphire black

Home/News/USA: Umweltbehörde EPA entlastet BMW Diesel-Motor...

USA: Umweltbehörde EPA entlastet BMW Diesel-Motoren

News | 29.05.2018 von Benny 0



Die Liste der großen Institute und Behörden, die den BMW Diesel-Motor entlasten, ist in diesen Tagen wieder länger geworden: Die US-Umweltbehörde EPA hat in Person ...

Die Liste der großen Institute und Behörden, die den BMW Diesel-Motor entlasten, ist in diesen Tagen wieder länger geworden: Die US-Umweltbehörde EPA hat in Person ihres Direktors Christopher Grundler ausführlich mit Wirtschaftswoche und Handelsblatt über die Diesel-Thematik gesprochen und dabei die Sonderrolle von BMW bestätigt. Neben Volkswagen habe seine Behörde auch Daimler im Visier, über BMW sagte Grundler hingegen klar: "Wir haben alle Produkte sehr gründlich untersucht und keine illegale Technik gefunden."

Zwar spricht EPA-Verantwortliche Grundler nur für die in den USA angebotenen BMW-Diesel und nicht für europäische Modelle, er nimmt mit seiner Aussage aber auch der Klage einer privaten US-Anwaltskanzlei den Wind aus den Segeln. Steve Berman verklagt BMW in den USA und wirft den Münchnern manipulierte Abgaswerte vor, was EPA-Chef Grundler allerdings relativiert: Seiner Einschätzung nach verfüge Berman sicher nicht über die Expertise und Labortechnik der EPA, die von Berman beauftragten Firmen nennt man bei der EPA leicht abfällig "zwei Männer und ein PEMS" und spielt damit auf ihre überschaubare Größe und Erfahrung an.



Die Wirtschaftswoche fasst die Situation für BMW damit zusammen, dass die Münchner von der EPA nichts zu befürchten haben. Das hätte EPA-Chef Scott Pruitt schon im März bei einem Treffen mit BMW-Chef Harald Krüger besprechen können, die konkreten Inhalte des damaligen Gesprächs sind aber nicht bekannt.

Vor der EPA hatten unter anderem Untersuchungen des ADAC und des TÜV die Diesel-Motoren der BMW Group entlastet. Immer wieder waren die Selbstzünder aus München mit überdurchschnittlich gut gereinigten Abgasen aufgefallen, Manipulations-Software mit Prüfstands-Erkennung oder dergleichen kam nach heutigem Stand nicht zum Einsatz.

Um so ärgerlicher ist es, dass menschliches Versagen bei einer kleinen Stückzahl von 11.700 Exemplaren des BMW M550d und 750d dazu geführt hat, dass die Motoren in Werkstätten mit einer falschen Motor-Software bespielt werden konnten. Die falsche Software brachte zwar weder auf dem Prüfstand noch im Alltag irgendwelche Vorteile und war daher denkbar ungeeignet für eine bewusste Manipulation, aber da im Diesel-Kontext gerade vieles in einen Top geworfen wird, hat die weiße Weste der BMW-Diesel dennoch ein paar völlig vermeidbare Flecken abbekommen.

[Abgasaffäre](#)
[BMW Diesel](#)
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BMW Individual: BMW M4 Cabrio in exklusivem Pyritbraun Metallic

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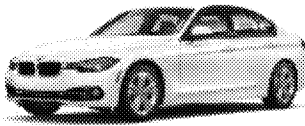
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EPA to let BMW sell diesels in U.S. for 2017

 thecarconnection.com/news/1105413_epa-to-let-bmw-sell-diesels-in-u-s-for-2017

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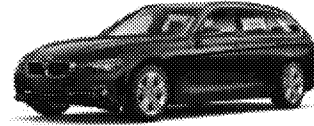
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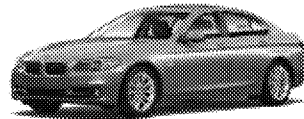


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5



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Richard Read Reporter

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August 5, 2016

Good news, diesel fans: Volkswagen hasn't ruined things for everyone. The EPA has approved BMW's 2017 model-year diesel lineup.

A few months ago, some might not have thought they'd ever see that sentence. Thanks to the ongoing fiasco known as Dieselgate, elected officials and regulators around the globe have been in an uproar, with many agencies pushing to speed up the transition to electric vehicles.

Heck, even Volkswagen--where the prospect of electrification has been met with responses ranging from "meh" to "nein, nein, nein"--finally came around. None of the company's 2016 model-year diesels have been approved for sale in the U.S., and it hasn't even asked about 2017 models. Back in June, Volkswagen's CEO, Matthias Muller, promised at least 30 electrified models by the year 2025.

That change of heart might be in Volkswagen's best interests. Governments are ramping up incentives for electric vehicles; regulatory agencies are giving diesels and gas-powered vehicles longer, harder looks; and growing numbers of consumers are drooling over electrics like the Tesla Model S. The sooner a company make the switch, the better market position it may have in the future.

But some automakers aren't ready to give up the diesel ghost. Mercedes-Benz is still turning them out (though its diesel C-Class and GLC-Class vehicles haven't yet been approved in America), and General Motors is planning a diesel version of the Chevrolet Cruze for next year. Mazda wants to get in on the action, too, though like Volkswagen, it hasn't figured out how to sell diesels in the U.S. without cheating on tests or compromising on performance.

BMW

BMW is still in the diesel game, too. This week, the Environmental Protection Agency confirmed that it has approved BMW's 2017 range of diesel vehicles for sale in the U.S. The EPA's Chris Grundler said that the cars were tested "every which way from Sunday", and they passed.

That may not make too much of a difference to BMW's bottom line. Diesels currently account for four percent of BMW's U.S. sales. But of course, every little bit helps.

BMW hasn't revealed which 2017 diesels were submitted to the EPA for approval. However, the company currently offers three diesel versions of its 3-Series sedan, two from its 5-Series, as well as diesel variants of the X3 and X5 crossover.

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